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# In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 923

VINCENT DE NIRO,

*Petitioner,*

vs.

STATE OF OHIO, ex rel. THOMAS A. BEIL,
Prosecuting Attorney of Mahoning County, Ohio,

*Respondent.*

## BRIEF OF RESPONDENT
In Opposition to Petition for a Writ of Certiorari.

THOMAS A. BEIL,
*Prosecuting Attorney,*

HAROLD H. HULL,
*Assistant Prosecuting Attorney,*
Mahoning County Courthouse,
Youngstown, Ohio,
*Counsel for Respondent.*

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VINCENT DE NIRO,

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STATE OF OHIO, *ex rel.* THOMAS A. BEIL,
Prosecuting Attorney of Mahoning County, Ohio,

*Respondent.*

## BRIEF OF RESPONDENT
### In Opposition to Petition for a Writ of Certiorari.

## HISTORY OF CASE.

A Petition was filed in the Court of Common Pleas in Mahoning County, Ohio, by Thomas A. Beil, as Prosecuting Attorney of said County, and was filed in the name of the State of Ohio. It was brought under R. C. 2915.02 of the Revised Code, relating to Gambling, which section provides, in part, "The Court upon proper application shall forthwith issue a temporary Writ of Injunction restraining the petitioner from conducting or permitting the continuance of such common nuisance until the case is heard upon its merits. * * *"

A hearing was had, witnesses duly sworn and testified. A temporary Order was granted by the Court, as follows:

> "This cause coming on to be heard before the Honorable David G. Jenkins on a petition for action for abatement of a common nuisance temporary injunction, perpetual injunction and equitable relief, it is ordered, adjudged and decreed that a temporary

injunction be and is hereby issued forthwith restraining the Defendants herein above named and John Doe and all other persons from conducting or permitting continuance of the nuisance described in the petition herein, and restraining all of the Defendants and other persons from using, conducting, permitting the playing of games of chance for money, of making wagers for money and engaging in other games of chance for money and other forms of gambling in, about or upon the real estate described in the petition; that the Defendants and all other persons be enjoined from using the real estate described in the petition for or in conjunction with gambling in any form or manner.

"It is further ordered, adjudged and decreed that the hereinabove described real estate and the building located thereon used in connection with the operation and maintenance of said nuisances, shall not be used for any purpose whatsoever until further order of this Court. * * *

"It is further ordered, adjudged and decreed that a copy of this order of temporary injunction be affixed by the Sheriff to the main entranceway and all other outside doors of the building described in the petition."

The above Order by the Court was, by Deputy Sheriff, personally served upon the petitioner and by him read in the presence of the Deputy.

Several days thereafter the Sheriff received a telephone call conveying the information that one of the phones on the premises in question was being answered by someone. He, together with several other Deputies, went to the premises, but when about a mile away therefrom one of the Deputies stopped telling the Sheriff he would use a phone and if the phone was answered, he would radio the Sheriff to that effect. The Deputy did

just this and when the phone was answered he returned to his car and radioed the Sheriff that there was some person in the premises. The Deputy then proceeded to rejoin the Sheriff. On the Sheriff's arrival there was no response to his knocks on the door to gain admission, whereupon the door was broken down, the Sheriff entered and found the petitioner therein—alone.

The Sheriff thereupon arrested the petitioner and took him to the County Jail. The matter was reported to the Court, who thereupon issued an Order for the petitioner to show cause why he was not in contempt by being on the premises.

Pursuant to the order of the Court, the Sheriff filed the following affidavit:

> "Paul J. Langley, being first duly sworn, deposes and says that he is the duly elected, qualified and acting Sheriff of Mahoning County, Ohio, and that on the 24th day of July, 1957, he had occasion to go to the premises mentioned and set forth in the Petition, wherein which premises are occupied by 'The Coffee Shop' in the front of the building and the space to the rear thereto being occupied by the 'Dry Men's Social Club' and that on arrival at said place, in company with several Deputy Sheriffs, he sought admission by knocking on the door, and upon such admission being refused he broke open the door, entered and found therein one Vincent DeNiro (the Petitioner), whose presence at the place and at the time was in violation of the order of this Court, entered July 22, 1957, as follows:
>
> 'It is further ordered, adjudged and decreed that the hereinabove described real estate and the building located thereon, used in connection with the operation and maintenance of said nuisances, *shall not be used for any purpose whatsoever* until further order of this Court.' (Emphasis ours.)

whereupon the said Vincent DeNiro was taken into custody by the Sheriff and Chief Deputy Reese and incarcerated in the County Jail, pending the action of the Court."

After hearing witnesses the Court found him guilty of contempt and sentenced him to imprisonment in the County Jail for a period of thirty days and to pay costs of the contempt proceedings. His conviction was affirmed by the Court of Appeals and the Supreme Court.

The jurisdiction of the Court over the petitioner and the subject matter was never questioned by the petitioner.

## THE LAW.

### SUPREME COURT OF THE UNITED STATES.

"Order must be obeyed until reversed even though statute under which order is issued is unconstitutional.

"Violation of a Court Order is punishable as a contempt, even though Order is set aside on appeal as in excess of the Court's jurisdiction."

*U. S. vs. United Mineworkers*, 330 U. S. 258.

Excerpts taken from the opinion in the above case follow:

Page 290.—"If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery. Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 450."

Page 292.—"Application of the rule laid down in United States v. Shipp, supra, is apparent in Carter v. United States, 135 F. 2d 858." * * * "But in Carter, a companion case, violations of the temporary restraining order were held punishable as criminal con-

tempt. Pending a decision on a doubtful question of jurisdiction, the District Court was held to have power to maintain the status quo and punish violations as contempt."

"It cannot now be broadly asserted that a judgment is always a nullity if jurisdiction of some sort or other is wanting. It is now held that, except in case of plain usurpation, a court has jurisdiction to determine its own jurisdiction, and if it be contested and on due hearing it is upheld, the decision unreversed binds the parties as a thing adjudged. Treinies v. Sunshine Mining Co., 308 U. S. 66."

Pages 293-294.—"Proceeding further, we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued. In Howat v. Kansas, 258 U. S. 181, 189-90, this Court said:

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

"Violations of an order are punishable as criminal contempt even though the order is set aside on appeal,

Worden v. Searls, 121 U. S. 14, or though the basic action has become moot, Gompers v. Bucks Stove & Range Co., 221 U. S. 418."

## STATE OF OHIO.

**Disobedience of Order and Violation of Injunction.**

An Order issued by a Court having jurisdiction of the subject matter and the persons must be obeyed until such Order is reversed or stayed by orderly and proper proceedings.

*Fawick Co. vs. United Electrical Workers*, 90 Ohio Appellate Reports 24.

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Deputy Sheriffs, appointed by virtue of a Court Order for the purpose of enforcing the terms of an injunction, are officers of the Court and violations of the terms of such injunction in the presence of such Deputies is, constructively, a violation in the presence of the Court.

*State, ex rel. vs. Compton*, 96 Ohio Appellate Reports 541.

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A person guilty of disobedience of a judgment of a Court may be punished as for contempt.

*Taylor vs. Holmes*, 96 Ohio Appellate Reports 181.

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An order issued by a Court with jurisdiction of the subject matter and person must be obeyed by the parties, however erroneous the action of the Court may be until the Order is reversed by orderly and proper proceedings.

*Cloverleaf Restaurant vs. Lenihan*, 80 Ohio Appellate Reports 477.

In a proceeding in contempt based upon the violation of an Order of the Court one may not in defense assert the validity of the order on other than jurisdictional grounds.

*Fawick Co. vs. United Electrical Workers*, 56 O. L. Abs. 65.

**Appellant's Action Constituted Contempt.**

In the case of *Markovic vs. the State*, 7 O. L. Abs. 491, the Court of Appeals—7th District—Mahoning County, the question before the Court was:

"If the court is without jurisdiction in issuing an order, which order is subsequently violated, can such court legally punish for contempt?"

The syllabus in the *Markovic* case, *supra*, reads:

"One who violates restraining order, may be punished for contempt, notwithstanding such restraining order was improvidently issued."

The Court, in its Opinion, spoke as follows:

"Concerning the second ground of alleged error it seems to assume that the action in which the contempt proceeding is alleged to have occurred, grew out of a restraining order, under what is commonly known as the padlock law, was based upon a violation of the liquor law, and that the convictions which the petition sets forth were based upon a city ordinance governing the possession of intoxicating liquors, which ordinance this court has heretofore found to be illegal and void by reason of penalty provided for in excess of that authorized by statute."

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Syl. 3. "Where a court is petitioned to abate a nuisance under Section 13195-1 et seq., General Code, and finds that a common nuisance exists in the opera-

tion of premises wherein intoxicating liquor is sold illegally, and decrees that the owner of such premises be permanently enjoined and restrained 'from selling or dealing in or serving beer or intoxicating liquor or beverages * * * at the premises * * * or in any place' in such county without a permit or in violation of law, the injunction against the sale of intoxicating liquor on the premises is entirely separate and distinct from the general provision against sales elsewhere in the county, and the invalidity of the latter provision does not affect the validity of the former."

*State, ex rel. vs. Denny's Place*, 98 Ohio Appellate Reports 351.

The Court, in its Opinion, page 355, said:

"In Sullivan v. State, 191 Ark., 180 83 S. W. (2d); 824, similar provisions in an injunction were reviewed in a contempt proceeding. The provision violated, however, was that enjoining the sale, etc., of intoxicating liquor on the premises (Old Heidelberg Inn) on which common nuisance had been maintained. The Court, at page 184, said:

'It must be conceded that a proceeding of this kind is to abate a nuisance conducted at a particular place. If it be conceded that, to the extent that the court enjoined W. E. Sullivan from the sale of liquor "elsewhere in Pulaski County," the order was in excess of power, that in no particular impairs the validity of the restraint insofar as it related to Old Heidelberg Inn.'

* * *In the case at bar, the injunction against the sale of intoxicating liquor at Denny's Place is entirely separate and distinct from the general provision against sales elsewhere in Butler County, and the invalidity of the latter provision does not affect the former. * * *"

Syl. 3. "The power to maintain order and to enforce process to the end that effect may be given to judgments, must inhere in every court or the purpose of its creation fails. Without such power no other could be exercised."

Syl. 4. "The County Sheriff, to whom is entrusted the preservation of the peace, is empowered not only to repel and repress any attempted violation of such order but to arrest, detain and incarcerate such person or persons as persist in seeking to do so, informing the person or persons arrested of his authority and cause of the arrest."

Syl. 5. "The law of a case as enunicated by a common pleas court is as much a part of the law of the State of Ohio to be observed and enforced as is a state statute, or city or village ordinance, the language of Sec. 13432-1 G. C., using the general and generic term 'law' and not the word 'statute' whose meaning is restricted to legislative law."

*State, ex rel., Bruns Coal Company vs. United Mine Workers*, 63 O. L. Abs. 531.

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"The violation or disobedience of an injunction order issued by a Court having jurisdiction in the matter, when committed by a party to the injunction suit or by a third party, having actual notice is a contempt of Court and is punishable as such by the tribunal issuing the order." * * * "One who is not a party to the injunction suit, but who is within the class of persons whose conduct is intended to be restrained * * * is guilty of contempt."

12 *Am. Jur.* "Contempt," Sec. 26, p. 407.

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Power to punish for contempt is inherent in all Courts and is essential to preserve order in judicial proceedings and the enforcement of judgments; it inheres

in the dignity of the Court itself, and is an attribute as essential and indispensable to the true administration of justice as the person of a judge.

*Socotch vs. Board of Liquor Control*, 66 O. L. Abs. 225.

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Proceedings in contempt cannot be held to await the determination of the main proceedings and a breach of an injunction may be punished before the equities in the principal case are settled.

*Ex parte Miller*, 87 Am. St. Rep. 49.

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"The only legitimate inquiry in a contempt proceeding based upon the violation of an injunction is whether the Court granting it had jurisdiction of the parties and of the subject matter; the question whether the order was erroneous will not be considered. If the Court had the jurisdiction required, the fact that its power was erroneously exercised does not render the injunction void, but only voidable on proper application; and, until set aside or revoked, is entitled to implicit obedience."

12 *Am. Jur.* "Contempt" Sec. 26, page 408.

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Syl. 2. "Violation of an Order of Court, whether it be *right or wrong, just or unjust* by any of the parties bound by it is punishable as contempt against the Court." (Emphasis ours.)

*Shipping Room Suppliers vs. Schoenl* 97 N. E. (2nd) 432, C. P. Franklin Co., Ohio.

## JUSTICE FRANKFURTER.

The recent utterance of Justice Frankfurter is especially pertinent to this case, it follows as reported in the press:

> "To bring a case here when there is no 'special and important' reason for doing so, when there is no reason other than the interest of a particular litigant, especially when the decision turns solely on a view of conflicting evidence or the application of a particular local doctrine decided one way rather than another by a court of appeals better versed in the field of such local law than we can possibly be, works inroads on the time available for new study and reflection on those classes of cases for the adjudication of which this court exists."

## HARVARD LAW REVIEW.

In the June, 1959 issue of the "Review," Vol. 72, No. 8, will appear an article on the within case under "Recent Cases," entitled:

> CONTEMPT—WHAT CONSTITUTES CONTEMPT—VIOLATION OF UNAUTHORIZED TEMPORARY INJUNCTION HELD CONTEMPT.—*State ex rel. Beil v. Dota* (Ohio 1958).

The closing paragraph reads as follows:

> "Applying these tests it seems that the court in the present case reached the correct result. The enjoining court's order is not frivolous since it is arguable that the temporary injunction granted was implicitly authorized by the statutory power to issue temporary orders against tampering with evidence. Furthermore, it is also arguable that the government is excused from the ordinary bond requirement and the court consequently is empowered to grant the temporary injunction under its general injunctive powers. Any harm to the defendant seems compensable, and

even if it were not, his failure to move to have the order modified and his disregard of a possibly effective appellate procedure should be sufficient to preclude collateral attack. Finally, even if the direct-attack procedure were ineffective, the disobedience would appear to be contumacious in that the potential injury to the state if the defendant could have tampered with evidence seems to outweigh any potential injury to the defendant discernible from the facts of the case."

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

THOMAS A. BERG,
*Prosecuting Attorney,*

HAROLD H. HULL,
*Assistant Prosecuting Attorney,*
*Counsel for Respondent.*

Dated May 27th, 1959.